Testimony on "Superfund Laws and Animal Agriculture"

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Subcommittee on Environment and Hazardous Materials

of the Committee on Energy and Commerce

on behalf of the

National Cattlemen's Beef Association

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Testimony of Robert T. Connery
on Superfund and Cattle Operations

Honorable Ladies & Gentlemen of the Subcommittee, my name is Robert T. Connery, appearing on behalf of the National Cattlemen's Beef Association ("NCBA") to discuss the application of the existing Superfund Laws to manure from cattle operations, and the need, in view of pending and threatened litigation, to clarify that those laws do not apply to manure from cattle operations. In particular, this testimony will address:

- The lack of any demonstrated need to cover manure from cattle operations as a "hazardous substance" under the Superfund laws.
- The adequacy of existing environmental laws other than the Superfund laws to adequately regulate and control any potential adverse effects from manure from cattle operations.
- The purpose of Superfund laws, fairly construed, to control synthetic, man-made, manufactured and produced chemicals, and hazardous wastes from modern chemical technology, not naturally-occurring substances such as manure from cattle operations.
- As a matter of sound legislative policy and common sense, (1) the rejection of Superfund's application to manure and (2) the reasonable requirement for a substantial showing to Congress of a severe toxic or hazardous problem from manure from cattle operations and other forms of animal agriculture before imposing the most coercive, burdensome and

inequitable of the nation's environmental laws on America's cattle ranching and feeding operations.

I. BACKGROUND

Livestock and other animal agricultural operators face growing concerns about potential CERCLA and EPCRA liability for emissions or discharges from manure produced in their operations. Congress, we respectfully submit, should clarify that it never intended to regulate manure under CERCLA or EPCRA. The "hazardous substances" that present issues regarding CERCLA and EPCRA applicability to livestock operations are ammonia and hydrogen sulfide.

"Cattle Operations" include operations that raise and feed cattle in open pastures and in open-air cattle feed lots. Grazing of cattle in open pastures is usually in fenced areas, and most feeding operations take place in fenced pens. Precipitation runoff from pastures and cattle feedlot surfaces is usually contained in runoff retention ponds. The precipitation runoff retention ponds that are part of Cattle Operations may, as described below, contain minor amounts of manure and urea from runoff, and as a result may produce some ammonia and hydrogen sulfide. These ponds are not waste lagoons, nor are they waste treatment facilities. The precipitation runoff retention ponds at Cattle Operations may contain small amounts of sulfur from the trace amounts of urea and manure reaching them as a result of precipitation runoff from pens. This sulfur originates in the soils and plants, grains and other feedstuffs, and in some cases, supplements, on which the cattle are fed. The sulfur in the ponds may produce some amounts of hydrogen sulfide by virtue of anaerobic decomposition. However, precipitation runoff retention ponds at Cattle Operations are designed to be aerobic, not

anaerobic. Thus little, if any, hydrogen sulfide is expected to be generated from these ponds.

The natural breakdown of nitrogen in grass and other feeds (primarily corn, but also including wheat, sorghum, and other grains and foods) during digestion by cattle results in some ammonia in flatulence, belching and exhalation. In addition, the bacterial decomposition of manure and urea excreted by cattle in pastures and feed pens produces ammonia over the weeks and months after it is excreted.

NCBA's exhaustive review of the statutes themselves, their legislative history, and their interpretation by EPA and the courts over the course of more than 20 years, discovered no mention or indication that substances resulting from flatulence, belching, exhalation, or excretion of urine or manure or their bacterial decomposition, or substances resulting from runoff that encounters and carries relatively small amounts of manure or urea into precipitation runoff retention ponds are covered by CERCLA or EPCRA. The terms of the statutes themselves, which cover "facilities" that "release" "hazardous substances" into the environment (discussed below) do not clearly or comfortably cover the biological and natural processes that result in ammonia and hydrogen sulfide at Cattle Operations. It is not a matter of broad or narrow reading of the terms of the statute, but whether those terms cover the biological and natural processes responsible for generation of ammonia and hydrogen sulfide at Cattle Operations at all. Such coverage is, NCBA believes, ambiguous at best, while the exception for "naturally occurring substances," 42 U.S.C.A. § 9604(a)(3)(A) (discussed below) does seem to cover those processes.

II. PURPOSE AND INTENT OF CERCLA

CERCLA was passed in the wake of Love Canal for the purpose of dealing with the "legacy of hazardous substances and wastes which pose a serious threat to human health and the environment." S. Rep. No. 99-73, at 12 (1985), and "to clean the worst abandoned hazardous waster [sic] sites in the country . . ." H.R.Rep. No. 99-253, Part 5, at 2 (1985). The legislative history contains a litany of references to "synthetic," "man-made" chemicals, "chemical contamination," and the results of "modern chemical technology" as the problems CERCLA intended to address. S. Rep. No. 96-848 at 2-6, 12 (1980); S.Rep. No. 99-11 at 1-2 (1985); S. Rep. No. 99-73, at 12 (1985); H.R. Rep. No. 99-253, part 5, at 2 (1985). It contains no reference to an intention to clean up manure or urea, or their byproducts, from cattle or any other animal agricultural operations.

In addition to clean-up of hazardous waste sites such as Love Canal, the Senate committee stated that the legislation was intended to cover "spills and other releases of dangerous chemicals which can have an equally devastating effect on the environment and human health." S. Rep. No. 96-848, at 5 (1980) and commented that such releases have resulted in the "loss of livestock and food products to contaminated drinking water and feed . . ." *Id.* It also noted that Superfund "may be used to compensate an agricultural producer . . . for loss" resulting from such releases of hazardous substances" *id.* at 78, and that such losses included injury to "livestock" *id.* at 79.

Livestock operations were viewed as needing protection, not as a source against which others might need protection.

Congress also indicated the scope of the activities it intended to cover in the provisions it made for funding the "Superfund" to pay for cleanup. The tax it imposed focused on "the type of industries and practices that have caused the problems that are addressed by Superfund;" Congress chose to impose the tax "on the relatively few basic building blocks used to make all hazardous products and wastes." H.R. Rep. No. 99-253, Part 1, at 141 (1985); S. Rep. No. 96-848, at 19 (1980). These building blocks, or chemical "feedstocks," are comprised of petrochemicals, inorganic raw materials, and petroleum oil because "virtually all hazardous wastes and substances are generated from these [substances]." *See id.* at 20; *see also* S. Rep. No. 99-73, at 3 (1985) ("The taxable chemical feedstocks generally are intrinsically hazardous or create hazardous products or wastes when used."); H.R. Rep. No. 99-253, Part 1, at 141 (1985). ("[T]he problems addressed by CERCLA are byproducts of productions processes that use these raw materials."). Manure, urea, and their byproducts, are clearly not among these materials.

The taxation provisions of CERCLA also indicate that substances like ammonia, when used for agricultural purposes, are not covered within the scope of CERCLA. Specifically, "nitric acid, sulfuric acid, ammonia, and methane used to produce ammonia, when used to produce or manufacture fertilizer, … [or] when used as a nutrient in animal feed," are exempted from taxation. S. Rep. No. 99-11, at 69 (1985); *see also* S. Rep. No. 99-73, at 9 (1985). The exemption is based largely on the premise that "taxation of these compounds when used to supplement animal feed constitutes a burden on both the animal feed industry and the American agricultural sector which

appears to be unnecessary." *Id.* Like taxation, regulation of the agricultural sector in the form of reporting requirements for the release of ammonia or hydrogen sulfide from livestock manure and urea would constitute an "unnecessary burden" on Cattle Operations.

III. RELEVANT EXEMPTIONS FROM CERCLA.

In EPCRA, Congress, recognizing that "CERCLA response authorities are extremely broad . . ." excluded from the scope of the federal response authority the release or threat of release "of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found." 42 U.S.C. § 104(a)(3)(A); *and see also* S. Rep. No. 99-11, at 16 (1985). The Senate committee report clarified this exception from EPA's response authority, noting that naturally occurring releases, such as "diseases or contamination resulting from animal waste (e.g. beaver excrement)," are excluded from the response program. S. Rep. No. 99-11, at 16 (1985). Thus naturally occurring animal waste, such as urine, urea and manure, in its unaltered form, or altered solely through naturally occurring process or phenomena, are excluded from EPA's response authority.

The flatulence, urine, urea, and manure, and the releases that result from them at dry, open-air Cattle Operations fall, we believe, within the purpose and terms of this exemption from EPA's response authority. Flatulence and the excretion of manure and urine from cattle are surely naturally occurring, and the location of that excretion is surely "where it is naturally found," i.e. wherever the cattle happen to be, whether in a

feed pen or a pasture. The manure and urine are unaltered. The precipitation and surface runoff affecting them are naturally occurring processes. The only change in the location of these animal wastes occurs when they are periodically removed from the cattle pens and recycled through composting and/or application to croplands. That movement does not materially affect the bacterial decomposition of the manure or urea, which occurs independent of its removal, transportation, sometimes composting, and application to croplands as fertilizer. The "normal application of fertilizer" is separately excluded from the definition of CERCLA "releases". 42 U.S.C.A. § 101 (22).

Some might argue that livestock are not "naturally" contained within fenced pens or in the large numbers involved in modern Cattle Operations. However, this ignores that the CERCLA exemption is directed at whether the *substance* is naturally occurring, not at the context or circumstances in which the substance might be released.

For reasons that apply with equal force to livestock operations, EPA has exempted from release reporting under CERCLA several substances that are not considered to present risks that warrant regulation under CERCLA. The agency has found reporting of such releases not to be consistent with the purposes of CERCLA release reporting:

> "This purpose, as the Agency has previously stated on numerous occasions, is to require 'notification of releases so that the appropriate federal personnel can evaluate the need for a federal response action and undertake any necessary response (removal or remedial action) in a timely fashion.' [citation omitted] . . . Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response,

> a basis for an exemption from the section 103 reporting requirements may exist."

54 Fed. Reg. 22524, 22528.

Based on this interpretation, EPA exempted release of "naturally occurring radionuclides from large, generally undisturbed land holdings, such as golf courses and parks, along with those activities that involve the disturbance of large areas of land, such as farming or building construction." *Id.*

With respect to disturbance of large areas of land, such as farming that caused releases of "reportable quantities" of radionuclides, EPA concluded that those "activities rarely would pose a hazard to the public health or welfare or the environment because releases would be dispersed widely in the environment at levels not much (if at all) above natural background. *Id.*

In the same rulemaking EPA exempted "the dumping of coal and coal ash, as well as radionuclide releases to all media from coal and coal ash piles, at utility and industrial facilities with coal-fired boilers." *Id.* EPA explained that it did so because "the Agency believes that the submission of individual reports from each industrial and utility facility with coal and coal ash piles may not be consistent with the purposes of the section 103 reporting requirement." *Id.* at 22529. (Emphasis added). It found that the concentration levels emitted from these piles

> "will always be emitted continuously at low levels spread over large areas" [and] "never will be emitted at a high rate or in an unusually large amount as the result of a sudden episodic release . . . . Perhaps more importantly, however, a response action (i.e., removal or remedial action) under CERCLA does not appear to be the most appropriate federal regulatory response to radiation releases that are (1) similar

> in amount and concentration across an entire sector of industry; (2) pose acceptable exposure risks; and (3) disperse quickly in the environment such that a response is not necessary to cleanup the accumulation of what has already been released."

Id.

On March 19, 1998, EPA broadened these exemptions from release reporting requirements for radionuclides for land disturbance "to include land disturbance incidental to extraction activities at all mines except limited categories with elevated radionuclide concentrations. 63 Fed. Reg. 13460, 13462, col. 2. It stated its authority to do so as follows:

> CERCLA sections 102(a), 103, and 115 together provide EPA with authority to grant administrative reporting exemptions. Such exemptions may be granted for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate. Requiring reports of such releases would serve little or no useful purpose and could, instead, impose a significant burden on the Federal response system and on the persons responsible for notifying the Federal government of the release. Through such reporting exemptions, therefore, the Federal response system is able to more efficiently implement CERCLA and EPCRA and more effectively focus on reports of releases that are more likely to pose a significant hazard to human health and the environment.

63 Fed. Reg. 13460 (Mar. 19, 1998).

EPA's interpretation of the scope of the naturally occurring substance exemption, and its authority to broaden it to cover other activities where response action is inappropriate, infeasible and unnecessary, have evident application and relevance to Cattle Operations. As noted above, manure is the kind of naturally-occurring substance Congress intended to exempt from CERCLA. And like

radionuclides from golf courses, real estate development or mining, and utility coal piles, CERCLA response actions would be neither appropriate nor practical respecting emissions related to manure.

The references to agriculture in the legislative history refer to Cattle Operations as a resource to be protected and compensated for loss rather than as operations which are a source of hazardous wastes to be regulated. To the extent there is mention or explicit treatment of agricultural activities or livestock, it is to exempt activities such as the "normal application of fertilizer," 42 U.S.C. 9601(22)(D), and the reporting of "the application of a pesticide produce registered under Federal Insecticide, Fungicide, and Rodenticide Act," 42 U.S.C. 9603(e). Normal agricultural activities were not intended to be covered under CERCLA. The legislative history of the fertilizer application exemption reflects Congressional awareness that chemical fertilizers did contain hazardous substances, but exempted them in normal use in agriculture. If it were the intent of Congress to make manure subject to CERCLA while it is located at livestock feeding operations, it would be anomalous for Congress to have exempted the CERCLA-regulated manure when it is located on croplands and used for fertilizer.

IV. Congress Should Consider the Adequacy of Existing Environmental Laws Before Applying the Extraordinary Remedies of Superfund Laws.

Cattle and other animal agriculture operations are subject to a vast array of federal, state and local environmental laws and authority to deal with every conceivable environmental problem presented by them. They include the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Toxic Substances Control Act, FIFRA, soil conservation, dust and odor control, as well as nuisance laws, apply

broadly throughout the country to provide environmental protection from every conceivable aspect of cattle and animal agricultural operations. For example, under the Clean Water Act, all concentrated feeding operations (CAFOs) are required to obtain an NPDES permit if they discharge to waters of the United States. Discharges to water from beef cattle CAFOs are prohibited, with a limited exception for overflow from properly designed and constructed retention ponds during extraordinary rainfall events. CAFOs must comply with best management practices for land application of manure and prepare nutrient management plans. 40 C.F.R. Sections 122.21, 122.23, 122.42, Part 412. There has been no indication that environmental laws such as these are inadequate.

The Superfund Laws, by contrast, were adopted for the most serious and drastic environmental problems where all other environmental laws had proved inadequate, and extraordinary remedies were called for. Superfund provides strict (no showing of wrongdoing, fault, or negligence), joint and several (an insignificant contribution [one-quarter of one percent]) can make any contributor liable for the entire clean-up), retroactive (exposure exists for activities that were legal at the time) liability, that may be imposed by unilateral order from EPA that is not subject to judicial review and carries treble damages for failure to comply. Could Congress have intended to impose such liability on the hundreds of cattle operations across America's heartland without even mentioning them? Of course not. In fact, in every instance where possible application of Superfund laws to biologic and natural process was discussed, Congress was clear to exclude those processes. That has not been enough to prevent litigation over applying the Superfund Laws to manure from animal agriculture, and decisions

that they apply. We hope Congress will determine that such operations do not warrant the drastic and coercive remedies of Superfund and clarify that in an amendment excluding manure from animal agriculture as a CERCLA hazardous substance.

V. Common Sense and Legislative Policy and Justification. NCBA submits that a mere common sense consideration of the natural and biologic processes involved with cattle raising and feeding, and the recycling of the manure that results, are not and should not be within the purview of the Superfund Laws. Those laws were intended to apply when all else failed. All else has not failed in the regulation of cattle operations. Congress, we suggest, should require more than unproven assertions and suggestions prior to imposing the extraordinary, coercive remedies of CERCLA on farming, ranching and cattle feeding. There should, we strongly suggest, be a very substantial showing of a national problem of toxic and hazardous proportions in order to justify the imposition of government's most drastic powers on its tens of thousands of cattle operations.

VI. CONCLUSION

In conclusion, NCBA believes that the Superfund laws, when read fairly and in accordance with their purposes and consistent with the other provisions of the statute, were not intended to apply to manure from Cattle Operations However, even if the Superfund laws were intended to apply to cattle and other animal agriculture operations in some cases, NCBA believes that ammonia and hydrogen sulfide from Cattle Operations either fall within the naturally-occurring substances exemption from EPA's response authority, or fit the criteria under which EPA has exempted other activities

from release reporting requirement because response action is not appropriate or feasible, such as releases of reportable quantities of radionuclides from mines, farming and land disturbance or releases from the dumping of coal and coal ash at facilities with coal-fired boilers. Releases of these substances from manure at livestock operations are not like the chemical releases that CERCLA was intended to address and do not present the type of health risks that warrant CERCLA cleanups. Even if manure emissions did present a significant risk, a CERCLA response action would not be a feasible or practical method of mitigating the risk.

We thank the Subcommittee for its consideration of NCBA's comments and position.

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